Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE FOY LOWRY,

Petitioner,

v.

SAM LEWIS, et al.

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was Bruce Lowry denied representation because his criminal trial counsel failed to file a motion to suppress evidence found during an unconstitutional search?

2. Was Lowry prejudiced by his counsel's failure to file a motion to suppress evidence, insofar as the motion to suppress would have been granted and the outcome of Lowry's criminal trial would have been different?

LIST OF ALL PARTIES TO THE PROCEEDING

Bruce Foy Lowry is the Petitioner.

Samuel Lewis, Director, the Arizona Department of Corrections and the Attorney General of the State of Arizona are the Respondents.

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REFERENCE TO OPINIONS BELOW

This Petition is based upon the Opinion of the United States Court of Appeals for the Ninth Circuit, filed April 7, 1994. The appeal in the Ninth Circuit was taken from the Report and Recommendation of the United States Magistrate Judge, filed October 1, 1992, and adopted by the District Court in the Order filed December 30, 1992.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court Decision was filed April 7, 1994. No rehearing was requested and no extension of time within which to file the Petition for Certiorari was requested.

The United States Supreme Court has jurisdiction to review the Judgment of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 2254.

JURISDICTION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 2254.

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV:

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. VI:

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VIII:

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Proceedings Below.

This case arises from a Petition for Writ of Habeas Corpus filed by Bruce Lowry in the United States District Court for the District of Arizona on June 19, 1990. (C.R. 1)[1] In his Petition, Lowry alleged his Sixth Amendment right to counsel was violated when his criminal lawyer failed to move to exclude evidence seized during a digital rectal search which violated Lowry's Fourth, Eighth and Fourteenth Amendment rights. The State of Arizona filed a Motion to Dismiss (C.R. 8) and on July 17, 1991, Magistrate Michael Mignella, Jr. ordered that an evidentiary hearing should be held on petitioner's contention that his trial

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[1]Citations to the record are to the U.S. District Court Clerk's Record ("C.R.") and the transcript of the evidentiary hearing held in the District Court. ("Evid. Hrg. Tr.")

counsel rendered ineffective assistance by failing to move to suppress evidence obtained during an illegal search and seizure. (C.R. 26) The evidentiary hearing was held on February 25, 1992, and on October 2, 1992, Magistrate Mignella filed his Report and Recommendation, recommending that the Motion to Dismiss the Petition filed by the State be granted. (C.R. 49)

On November 6, 1992, Judge Muecke adopted the Magistrate Judge's Report and Recommendation since no objection had been filed by the petitioner. (C.R. 51) The petitioner filed a Motion to Extend Time to File Objections to the Report and to Vacate the 11/6/92 Judgment (C.R. 53). At the same time, the petitioner filed his objections to the Report and Recommendation of the magistrate judge. (C.R. 53) Petitioner's Motion was granted by Judge Muecke (C.R. 58) and on December 30, 1992, Judge Muecke

ordered that the Petition for Writ of Habeas Corpus be dismissed and judgment was entered on that day. (C.R. 58, 59)

On January 29, 1993, petitioner Lowry filed his Notice of Appeal. (C.R. 62) The Opinion of the Court of Appeals for the Ninth Circuit was filed on April 7, 1994, affirming the District Court.

B. Factual Basis for Habeas Corpus Relief.

Lowry's Writ of Habeas Corpus arises from his criminal conviction for promoting prison contraband and possession of a dangerous drug. These convictions were based upon evidence alleged to have been seized during a series of digital rectal cavity searches performed at the Arizona State Prison in Florence on March 15, 1984.[2]

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[2]Lowry was also a plaintiff in a § 1983 action brought against the Director of the Arizona Department of Corrections alleging that the rectal searches violated his civil

In March, 1984, Lowry was an inmate of Cellblock 6 at the Arizona State Prison. Prior to March 15th, prison officials had received information that inmates in Cellblock 6 were concealing high grade explosives in their rectums. Evidence of the plan was provided to the prison officials by an informant.[3] According to the informant, the inmates in Cellblock 6 intended to stage an incident for the

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rights. See, Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988) ("Vaughan 1") (denial of the defendants' Motion for Summary Judgment on the issue of qualified immunity was affirmed and the case was remanded for trial); Vaughan v. Ricketts, 927 F.2d 476 (9th Cir. 1991) (statute of limitations did not bar claims)("Vaughan 2"); and Vaughan v. Ricketts, 950 F.2d 1464 (9th Cir. 1991) ("Vaughan 3"), in which a jury verdict against the inmates was affirmed.

[3]Lowry does not contend as a basis for his Petition for Writ of Habeas Corpus that probable cause for the search and seizures was not present. Rather, it is the method of performing the searches and seizures which makes them unreasonable under the Fourth, Eighth and Fourteenth Amendments.

purpose of luring the prison guards into a particular pod and bombing them. The bombs would be made with the explosives, blasting caps and shrapnel material. Some of these items were supposedly being store by the inmates in their rectums. According to the informant, the incident was to take place shortly. (C.R. 49 at 31). As a result, prison officials decided to conduct a surprise inspection of the rectums of the inmates in Cellblock 6.

In March, 1984, the Arizona State Prison at Florence had a Central Health Unit in a part of the prison away from Cellblock 6, to which prisoners could be sent for their health needs. (C.R. 46, at p. 7, par. 7.)[4]. In addition, Cellblock 6 had its own

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[4]Evidence in this case was received by the judge magistrate in three ways: first, discovery taken in the civil matter, Vaughan v. Ricketts was filed with the court with no objection by the State. Second, the transcript of the trial in Vaughan v.

health area where correctional medical assistants could provide medical care. (C.R. 46, p. 7, par. 34, 35). Despite these facilities, correctional officials decided to conduct the rectal searches in an open hallway, on uncovered tables, less than 100 feet from the health area in Cellblock 6. (C.R. 46, p. 7, par. 34).

Exhibit 1 at the evidentiary hearing was a videotape, taken by correctional officials, of the rectal searches performed

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Ricketts was also filed and reviewed by the judge magistrate, also with no objection by the State. Finally, an evidentiary hearing was held on February 25, 1992, in which Bruce Lowry and his criminal counsel, Leonard Sowers, testified. The court also received in evidence a videotape showing the digital rectal searches and a map of cellblock 6. (Clerk's minutes filed 2/25/92) The evidence from Vaughan v. Ricketts was summarized by petitioner in Petitioner's Evidentiary Hearing Memorandum (C.R. 34) and Petitioner's Supplementary Evidentiary Hearing Memorandum (C.R. 35) and by petitioner's Memorandum in Support of Proposed Findings of Fact and Conclusions of Law (C.R. 46).

on March 15th. This videotape reveals the true brutality of these searches. Correctional officials stormed into Cellblock 6 and removed prisoners from their cells. They were lined up in an open hallway with a multitude of people looking on: some guards, some trainees from the academy and some other unidentified persons. The inmates were held down over a conference room table and submitted to rectal cavity searches. (Videotape, and C.R. 46, p. 5, par. 19 et seq.)

Correctional medical assistants had not been trained by the Department of Corrections to conduct rectal searches. The table upon which the searches were conducted was not covered with a sheet of paper or any other material. The correctional medical assistants conducting the searches did not wash their hands in between searches. The area where the searches were conducted was

clearly visible to other inmates and personnel. It was also visible to other inmates. (C.R. 46, p. 5, 6, par. 20-24). During the searches, there was a lot of cheering and jeering from inmates. Derogatory remarks were also made by those standing around, such as "taking people's cherries." (C.R. 46, p. 6, par. 25, 26).

There was no inspection of medical records of the inmates prior to the searches to learn if they had any physical condition which could be aggravated by such a search. The inmates were forced to submit to the searches. Bruce Lowry asked if he had any choice in submitting to the search. He was told no and was thrown down on the table. He was not allowed to pull down his own pants and after the search was completed, he was not given an opportunity to clean himself in any way. (C.R. 46, pp. 6, 7, par. 27-31).

The security staff at the prison claimed they had to conduct these searches in the hallway instead of the health area on Cellblock 6 because they didn't want to tie up the health area hunting for the explosives. (C.R. 46, p. 7, par. 35). They felt it was necessary to leave the health area on Cellblock 6 for any trauma that might occur. This was the justification for conducting body cavity searches just 100 feet from the health area which at least offered sanitary conditions and some privacy for the inmates. However, there were no medical doctors in the health unit within Cellblock 6 on March 15th. Testimony established that if a trauma arose, depending on the level of the trauma, the patient would be sent to the Central Health Unit in a different part of the prison, or to Pinal General Hospital. (C.R. 46, p. 7, par. 35-37).

The Department of Corrections' rationale for conducting these searches in a hallway falls apart when the court examines the subsequent events. On March 15, every one of the 15 inmates in the Cellblock 6 pod that were searched, were transferred to the health unit for another rectal examination, even if the rectal search in the hall at Cellblock 6 was negative. (C.R. 46, p. 8, par. 38). The Department of Correction employees also admitted that a balloon (the method the inmates supposedly used to store materials in their rectum) would show up on an x-ray. (C.R. 46, p. 8, par. 40). Yet the Department of Corrections claimed it didn't want to do x-rays first, in order to avoid performing a digital rectal search on all of the inmates, because it would be inappropriate to expose inmates to x-rays unless it was necessary.

Once again, the Department of Corrections' rationale is transparent given the subsequent events. It is clear that the prison officials intended all along to do an x-ray, whether the rectal search revealed anything or not. This is evidence by CMA Mike Larue's statement after searching Lowry, stating that Lowry was "cleared for x-ray." (C.R. 46, p. 8, par. 9). The justification for not performing x-rays first is also transparent because every single one of the inmates searched that day was later x-rayed. (C.R. 46, p. 8, par. 39).

Most persuasively, a physician who was employed at the Arizona State Prison at Florence in March of 1984 stated in the Vaughan trial, "There was no need to do it [perform the rectal searches] in the hallway. There was an examining room there." (C.R. 46, p. 8, par. 18). In addition, the correctional medical assistant

who actually examined Bruce Lowry testified that he had not received any training on now to conduct a rectal search. (C.R. 46, p. 8, par. 42).

During a rectal search of petitioner Lowry, prison officials claimed they recovered prison contraband in the form of a syringe and methamphetamines. (C.R. 46, p. 2, par. 3). As a result, Lowry was tried in Pinal County Superior Court for promoting prison contraband, a class 5 felony and possession of a dangerous drug, a class 4 felony. Leonard Sowers defended Lowry in State v. Lowry, Pinal County No. CR 11264. (C.R. 46, p. 2, par. 1). In defending Lowry, Sowers understood that the charges against Lowry were for possession of contraband that was recovered during a rectal search of his client. During the course of Sowers' representation of Lowry in the criminal case, Sowers learned that his

client was involved in a civil lawsuit brought by the American Civil Liberties Union on behalf of inmates contesting the reasonableness of the anal cavity searches relating directly to the criminal case.

In fact, Sowers obtained a transcript of one of the Department of Correction employees' testimony concerning the rectal cavity searches from an Arizona State University professor who was representing plaintiffs in that civil case. Sowers was also told by Lowry specifically that constitutional issues raised in Vaughan v. Ricketts, (Vaughan 1) challenged the manner in which the digital cavity searches were conducted. (C.R. 46, pp. 2-3, par. 2-8). Nevertheless, Sowers showed no interest at all in finding out more information about Vaughan v. Ricketts despite knowing there was a constitutional issue involving the

search that formed the basis of the civil suit. (C.R. 46, p. 3, par. 9, 10).

During Lowry's criminal trial, Sowers did not move to suppress the evidence that was alleged to have been taken as a result of the rectal searches. The reason Sowers did not move to suppress the evidence was because he "heard" in other cases against inmates who had been searched at the same time as Lowry that motions had been made and denied. Sowers' belief about the outcome of such motions in other cases was based on talking with attorneys trying the other cases. (C.R. 46, p. 3, par. 9-13). Sowers did no research on behalf of Mr. Lowry into whether there was case law to support a motion to suppress the contraband. Sowers did no additional discovery in the criminal case specifically to support a motion to suppress and directed at the manner in which

the rectal searches were conducted. (C.R. 46, pp. 3, 4, par. 11-15).

In the criminal case against Lowry, the only physical evidence that was offered against Lowry was the contraband alleged to have been taken from him during the rectal search and an x-ray. No one testifying in the criminal case was qualified to read the x-ray. (C.R. 46, p. 4, par. 16, 17). Lowry's defense attorney, Sowers, admitted at the evidentiary hearing in this matter that if the evidence taken as a result of the rectal search had been suppressed, the State would not have continued prosecuting Mr. Lowry. (C.R. 46, pp. 4, 5, par. 18).

Lowry appealed his criminal convictions to the Arizona Court of Appeals and in January, 1988, his appellate counsel, Victor Ortiz, filed an Opening Brief. (C.R. 13, p. 3, par. 6) Almost all of that Brief was devoted to the argument that the trial court

should have precluded one of the State's witnesses from testifying because a report by that witness had been lost prior to trial. However, Ortiz also contained a statement "in compliance with" Anders v. California, 386 U.S. 738 (1967), and State v. Leon , 104 Ariz. 297, 451 P.2d 878 (1968), indicating that he had reviewed the record for "fundamental or reversible error" but had found none. More specifically, Ortiz stated that he had researched an "arguable issue" but had determined that "the case law does not support any error." The "arguable issue" was stated in one sentence -- "was appellant denied effective assistance of counsel at any state of his proceedings?" -- without any reference to the record or pertinent case law. (C.R. 13, pp. 3-4, par. 6).

On May 17, 1988, the Court of Appeals affirmed Lowry's convictions. With respect

to the Anders issue of ineffective assistance of counsel, the court did not discuss trial counsel's performance. Instead, the court noted that the evidence at trial included evidence that "a digital examination revealed that methamphetamine and a needle and syringe were being stored in [defendant's] rectum" and concluded that there was no "reasonable ground to believe that other representation, no matter how 'effective,' could have led to a different result."

On May 10, 1989, Lowry filed a Petition for post-conviction relief in the trial court, pursuant to Ariz. R. Crim. P. 32. (C.R. 13, pp.4-5, par. 8) This Petition was based on the single claim that Mr. Lowry had been deprived of his right to effective assistance of counsel because his trial counsel had failed to move to suppress the evidence on which his convictions had been

based, even thought that evidence had been obtained after "grossly abusive digital rectal cavity searches and other procedures" that violated Mr. Lowry's clearly established Fourth, Eighth and Fourteenth Amendment rights. Attached to the Petition was an Affidavit by Lowry setting forth the manner in which he had been searched and a copy of Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988) in which the Ninth Circuit Court of Appeals had held, in a civil action involving the same set of searches, that if certain facts were proven, then those searches violated Fourth, Eighth and Fourteenth Amendment standards that were clearly established when the searches took place. (C.R. 13, pp. 4-5, par. 8).

On July 31, 1989, the trial court entered an Order summarily dismissing Lowry's Petition for Post-Conviction Relief

on the basis that the court had determined that:

> No material issue of fact or law exists which would entitle the petitioner to relief (i.e. -- the issues now raised by the petitioner were raised and decided adversely to him on appeal or were knowingly and voluntarily not raised on appeal) and that no purpose would be served by any further proceedings.

On August 31, 1989, the trial court summarily denied Mr. Lowry's Motion for Rehearing. Lowry then petitioned for review by the Court of Appeals (C.R. 13, p. 5, par. 9, 10).

In a two-sentence Order, the Court of Appeals ruled that defendant Lowry's claim for post conviction relief was precluded because a "similar" claim was denied on direct appeal, and that Lowry had not claimed a "colorable claim as to the trial court's possible ruling on the Motion to Suppress which was never made . . . ." On

January 11, 1990, Lowry filed a Petition for Review by the Supreme Court of Arizona. That Petition was denied on March 20, 1990. (C.R. 13, pp. 5, 6, par. 11-13).

Lowry then filed his Petition for Writ of Habeas Corpus in the U.S. District Court in the District of Arizona on June 19, 1990. As indicated above, evidence was taken by the magistrate, who issued a report and recommendation (C.R. 49, E.R. 2) and the trial judge adopted without change the report and recommendation. The Ninth Circuit affirmed the Decision of the District Court. (Opinion filed April 7, 1994)

ARGUMENT

A. Legal Elements

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for determining whether ineffective assistance of counsel rises to the level of a Sixth Amendment violation.

> A convicted defendant's claim that counsel's assistance was so defective so as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the

> adversary process that renders the result unreliable.

466 U.S. at 687.

The Court further elaborated on each of these elements. With regard to the deficiency of counsel's performance, Justice O'Connor explained, "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. The court also explained, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. Finally, the Court explained that the obligations of counsel must be considered in a case-by-case manner, taking into account whether counsel's assistance was reasonable considering all the circumstances. Id.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.
>
> * * *
>
> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-691.

With regard to the second element, the defendant must show that counsel's deficient performance prejudiced the defense. The Court explained,

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694. Thus, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. Rather, the defendant need only show a reasonable probability that the outcome would have been different. Id.

Here, Mr. Lowry contends that his defense counsel was deficient in failing to move to suppress the evidence alleged to have been discovered as a result of the rectal search on March 15, 1984. Lowry must also show that had Sowers moved to exclude the evidence, the state court would have concluded that this evidence had been seized in violation of Mr. Lowry's Fourth, Eighth and Fourteenth Amendment rights. Finally,

Lowry must show that the exclusion of the evidence would have resulted in an acquittal.

B. Reasons for Accepting Certiorari.

The Ninth Circuit determined that Lowry's Petition failed
for two reasons. Each of these reasons is incorrect.

1. Lowry's Counsel's Performance was Deficient.

The court found that Leonard Sowers' performance was not deficient in failing to file a Motion to Suppress. This holding is based upon the mistaken factual belief that Mr. Sowers actually researched the viability of a motion to suppress. The Ninth Circuit also found that he had talked to other lawyers who were representing other prisoners like Mr. Lowry who were being prosecuted for contraband found in the searches this is correct. In fact, the only

thing Mr. Sowers did was talk to other lawyers involved in other cases. He did absolutely no research of his own. He also did no additional discovery in the criminal case specifically to support a motion to suppress, as Mr. Sowers admitted in testimony at the evidentiary hearing on this Petition for Habeas Corpus. (Evid. Hrg. Tr. p. 9, l. 10 - p. 10, l. 9)

The Ninth Circuit opinion states, in effect, that in representing a client, a criminal defense attorney can do nothing more than talk to other attorneys about the viability of a motion to suppress. This must be found to be deficient lawyering.

Moreover, had Leonard Sowers done the most minimal research, he would have found a very open question on whether such searches were constitutional. The Ninth Circuit itself found that a reasonable prison official would have appreciated that the

searches may have been unconstitutional. Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988). If this would have indicated to a prison official that the searches could very well be unconstitutional, this research certainly would have indicated to "experienced trial counsel" that a motion to suppress needed to be filed.

For this reason, this court should overturn the Ninth Circuit's holding that Lowry's criminal trial lawyer was not ineffective.

2. A Motion to Suppress Would Have Been Successful.

The Ninth Circuit also determined that even if a motion to suppress had been filed, it would not have been successful. Therefore, Lowry suffered no prejudice from his ineffective assistance of counsel, insofar as the outcome of this criminal trial would not have been different. First,

it has been undisputed throughout this appeal that without the evidence, Lowry would not even have been prosecuted. This was the only evidence offered against Lowry (Evid. Hrg. Tr. p. 10, ll. 10-19) and Mr. Sowers testified at the evidentiary hearing that had the evidence been suppressed, that state would not have even continued prosecuting Lowry. (Evid. Hrg. Tr. p. 12, ll. 3-6)

The Ninth Circuit found that Lowry could not present a "reasonable probability" that a motion to suppress would have been successful. This finding is based upon the court's assumption that other prisoners had lost similar motions and the denials were upheld on appeal, citing State v. Bloomer, 751 P.2d 592, 594 (Ariz. Ct. App. 1987) and State v. Palmer, 751 P.2d 975, 976 (Ariz. Ct. App. 1987). However, these decisions were made by the Arizona Court of Appeals

prior to the Ninth Circuit's decision in Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988). Vaughan v. Ricketts was a lawsuit filed on behalf of prisoners by the American Civil Liberties Union under 42 U.S.C. § 1983, claiming that the searches of their rectums violated the prisoners' civil rights. Summary judgment was granted and an appeal was taken which resulted in the Ninth Circuit's first Vaughan Opinion, 859 F.2d 736 (1988). In that Decision, the court overturned summary judgment, finding that if evidence claimed by the prisoners were true, the searches would violate the constitutional rights of the prisoners. The 9th Circuit found in Vaughan that there were violations of three constitutional amendments: the Fourth Amendment, the Eighth Amendment and the Fourteenth Amendment, based on the facts presented.

With regard to the Fourth Amendment, the Court stated:

> Vaughan alleges he was searched on a table in an open hallway, by medical assistants untrained in involuntary body cavity searches. The table was not sanitary, and the medical assistants did not wash their hands between searches. The area was clearly visible to other inmates and prison personnel, and some personnel made jokes and insulting comments. No official made an inspection of medical records to insure that individual inmates did not have medical conditions that made the searches dangerous. Inmates who resisted were forced to submit. At least one inmate search repeated later in the medical unit was visible to female personnel. No reasonable officer could believe that such searches were conducted in a reasonable manner, and so Ricketts was not entitled to qualified immunity on Vaughan's Fourth Amendment claim.

859 F.2d at 741. A necessary part of this finding is that such a search violated the Fourth Amendment.

As for the Eighth Amendment, the Court found,

> Taking all Vaughan's allegations as true, Ricketts cannot claim that the prison officials enjoyed qualified immunity from suit for Eighth Amendment violations. As required for an Eighth Amendment violation the searches as described show more than mere negligence. The manner in which Vaughan alleges the searches were conducted constitutes an unnecessary use of force showing an wanton disregard for the health and safety of the inmates. Compare United States v. Coldwell, 750 F.2d 341 (5th Cir. 1984) (no Eighth Amendment violation where reckless search was called off when possibility of injury arose, and no unnecessary force was used), (cert. denied 461 U.S. 1007 (1985)).

859 F.2d at 741. Thus, an Eighth Amendment violation was found.

Finally, the Ninth Circuit found violations of the Fourteenth Amendment.

> [I]n order for Vaughan to avert Ricketts claim of qualified immunity under the Fourteenth Amendment, he must show that a reasonable prison official would have known that the digital rectal searches, conducted as alleged, were "maliciously and sadistically applied for the purpose of causing harm." Under the facts as alleged

> by Vaughan, the reasonable prison official in 1984 would have understood that the searches were conducted in a brutal fashion that was not justified by a need for force. The extent of possible injury was great, and at least one inmate suffered significant injury [Lowry]. The joking and insults directed at the inmates support an inference that the force was maliciously and sadistically applied. Ricketts was not entitled to qualified immunity on Vaughan's Fourteenth Amendment claim."

859 F.2d at 742. Again, a necessary part of this holding is that the Fourteenth Amendment was violated. Therefore, if Lowry established the facts which the Ninth Circuit assumed to be true in Vaughan, this court must find that Lowry's constitutional rights were violated and the evidence would have been suppressed.

This Decision was never considered by the Arizona Courts of Appeals in Bloomer or Palmer. Had this opinion been available, there is more than a reasonable probability

that the Arizona courts would have upheld a motion to suppress.

The Ninth Circuit correctly noted that the prisoners lost their § 1983 suit only because the jury found a qualified immunity. Therefore, the ultimate conclusion in the 1983 suit supports the unconstitutionality of the searches.

CONCLUSION

For the reasons stated, Petitioner respectfully asks this court to reverse the Opinion of the Ninth Circuit and the District Court and grant his Petition for Habeas Corpus relief, finding that he was denied effective assistance of counsel. Had he been given effective assistance of counsel as required by the Sixth Amendment to the United States Constitution, the evidence against him which formed the basis of his conviction would have been suppressed and he would not have been convicted.

Respectfully submitted,

DATED: 8-2-94

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BRUCE FOY LOWRY, Petitioner, v. SAM LEWIS, et al., Respondents.	CIV 90-0927 PHX CAM (MM) REPORT AND RECOMMENDATION

TO THE HONORABLE C. A. MUECKE, U.S. DISTRICT JUDGE.

Bruce Foy Lowry, confined at the Arizona State Prison Complex in Florence, Arizona, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondents filed a motion to dismiss the petition, which was ordered treated as a motion for summary judgment. Petitioner's appointed counsel filed a response to the motion. Petitioner's counsel also filed an amended petition. Respondents filed a supplement to the motion for summary

judgment addressing the amended petition, to which Petitioner filed a response.

Petitioner challenges his conviction for promoting prison contraband and possessing dangerous drugs while an inmate at the Arizona State Prison Complex in Florence, Arizona. He contends that his conviction was based upon the following: (1) an illegal search and seizure in violation of his fourth, eighth, and fourteenth amendment rights; and (2) that his counsel was ineffective for failing to challenge the search and seizure by raising fourth, eighth, and fourteenth amendment violations.

The search at issue in this proceeding was also the ;subject of an action pursuant to 42 U.S.C. § 1983, Vaughan v. Ricketts, CIV 84-624 PHX CAM (MM). This Court ordered the parties to brief the issue of whether the judgment in that case had preclusive

effect in this habeas corpus proceeding. Upon finding that Vaughan v. Ricketts did not have preclusive effect, this Court held an evidentiary hearing on February 25, 1992, to resolve Petitioner's ineffective assistance of counsel claim. Review of that claim required the presentation of evidence as to the merits of Petitioner's Fourth and Eight Amendment. Accordingly, the evidence presented before this Court included testimony at the evidentiary hearing along with deposition and trial transcripts from the Vaughan v. Ricketts proceeding and the transcript from the trial which resulted in the conviction which Petitioner challenges here.[1]

BACKGROUND

Petitioner was found guilty in state court of promoting prison contraband and

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[1]State of Arizona v. Bruce Foy Lowry, Pinal County Cause No. CR 11267.

possessing dangerous drugs. (Exhibit A to Respondents' Motion to Dismiss, ordered treated as a Motion for Summary Judgment, at 1). In an Anders[2] brief, Petitioner claimed that the trial court erred by allowing a state's witness to "testify although his report had been lost and had not been provided to [Petitioner]." (Id. at 2). The Arizona Court of Appeals found no error in the admission of the testimony; however, it observed Petitioner's appellate counsel's "suggest[ion] that trial counsel may have been ineffective." (Id. at 3). The court determined that "there is no reasonable ground to believe that other representation, no matter how 'effective,' could have led to a different result." (Id.). Petitioner did not appeal this decision to the Arizona Supreme Court. (Exhibit C).

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[2]Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493 (1967).

On May 10, 1989, Petitioner filed a petition for post-conviction relief, pursuant to Rule 32, Arizona Rules of Criminal Procedure. Petitioner asserted the following:

> 1. That evidence introduced at trial was obtained by an unconstitutional search and seizure; and
>
> 2. That Petitioner was denied effective assistance of counsel at every critical stage of the proceeding.

Petitioner attached the following statement to his petition as "Attachment A" in support of his claims:

> The evidence on which my convictions in this case were based was obtained after grossly abusive digital rectal cavity searches and other procedures that violated my fourth, eighth, and fourteenth amendment rights. However, my trial attorney failed to move to suppress this evidence. The United States court of Appeals for the Ninth Circuit has specifically held that the manner in which I was searched in this case violated clearly established fourth, eighth, and fourteenth amendment rights. Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988). My attorney's failure to move to suppress evidence

> that was obtained in violation of clearly established constitutional rights deprived me of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and the Arizona Constitution.

On July 31, 1989, the trial court entered an order summarily dismissing the petition. After reviewing the record, the court concluded:

> [N]o material issue of fact or law exists which would entitle the Petitioner to relief (i.e., - the issues now raised by the Petitioner were raised and decided adversely to him on appeal or were knowingly and voluntarily not raised on appeal) and that no purpose would be served by any further proceedings.
>
> IT IS THEREFORE ORDERED, the Petition For Post-Conviction Relief is summarily denied.

(Exhibit D).

Petitioner filed a motion for rehearing, which the trial court denied. (Exhibit 8 to Petitioner's Response to the Motion for Summary Judgment).

Petitioner filed a petition for review by the Arizona Court of Appeals on September 7, 1989. The court denied the petition for review stating:

> It appearing to the court that petitioner's claim for relief under Ariz. R. Crim. P. 32, 17 A.R.S., is precluded under Rule 32.6(c), in that a similar claim was raised on direct appeal and was denied, and petitioner not raising a colorable claim as to the trial court's possible ruling on a motion to suppress which was never made, therefore, the trial court did not err in summarily denying post-conviction relief. The petition for review is denied.

(Exhibit 10).

Subsequently, Petitioner filed a petition for review by the Arizona Supreme Court. The court denied the petition for review summarily. (Exhibit 11).

EXHAUSTION OF REMEDIES

AND PROCEDURAL DEFAULT

"Two related but distinct doctrines of federal habeas corpus law-exhaustion of state remedies and state procedural default-

-play important roles in federal habeas proceedings brought by state prisoners." Jackson v. Cupp, 693 F.2d 867, 868-69 (9th Cir. 1982) (per curiam); Batchelor v. Cupp, 693 F.2d 859, 861 (9th Cir. 1982), cert. denied, 463 U.S. 1212, 103 S. Ct. 3547, 77 L. Ed. 2d 1395 (1983). Both doctrines stem from the basic principle of federalism that "federal courts should accord due respect to the role of state courts in enforcing the prohibition against unconstitutional confinement embodied in the writ of habeas corpus." 693 F.2d at 861-62.

A. Exhaustion of Remedies

It has been settled for over a century that, except in unusual circumstances, a state prisoner must exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts. Duckworth v. Serrano, 454 U.S. 1, 3, 102 S. Ct. 18, 19, 70 L. Ed. 2d 1 (1981) (per curiam);

accord Rose v. Lundy, 455 U.S. 509, 515, 102 S. Ct. 1198, 1201-02, 71 L. Ed. 2d 379 (1982). The exhaustion doctrine, first developed in case law, is not codified in 28 U.S.C. § 2254. Section 2254 provides in part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The exhaustion requirement is based on comity, thus it serves the interest of judicial economy, providing state courts with the first opportunity to pass upon and

correct violations of a prisoner's federal constitutional rights. Duckworth, 454 U.S. at 2, 102 S. Ct. at 19. The doctrine is not jurisdictional, however. Rose, 455 U.S. at 515-16, 102 S. Ct. at 1201-02; Picard v. Conner, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971); Schwartzmiller v. Gardner, 752 F.2d 1341, 1344 (9th Cir. 1984).

The exhaustion doctrine holds that each state prisoner must exhaust state remedies as to each and every claim contained in a federal habeas petition before such a petition will be considered by a federal court. Rose, 455 U.S. at 522, 102 S. Ct. at 1205. This requirement may be satisfied in one of two ways.

Once a claim is fairly presented to a state's highest court, so that the court has a fair opportunity to rule on the merits, the exhaustion requirement is satisfied as

to that claim. Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021, 106 S. Ct. 3336, 92 L. Ed. 2d 741 (1986). A claim is "fairly presented" if a petitioner describes the operative facts and legal theories on which he or she bases the claim; that is, that the "substance" of the claim is presented. Picard, 404 U.S. at 277-78, 92 S. Ct. at 513; Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). See Falconer v. Lane, 905 F.2d 1129, 1134 (7th Cir. 1990). While a petitioner need not cite "chapter and verse" of the Constitution, Tamapua, 796 F.2d at 263, it is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982).

Generally, a petitioner should present his or her claim to the state's highest court by properly pursuing it through either the state's direct appeal process or through appropriate post-conviction relief. See Sweet v. Cupp, 640 F.2d 233, 235 (9th Cir. 1981). Only one of these avenues of relief must be exhausted before bringing a habeas petition in federal court. This is true even where alternative avenues of reviewing constitutional issues are still available in state court. Turner v. Compoy, 827 F.2d 526, 528 (9th Cir. 1987), cert. denied, Compoy v. Turner, 489 U.S. 1059, 109 S. Ct. 1327, 103 L. Ed. 2d 595 (1989).

Alternatively, a petitioner can satisfy the exhaustion requirement by demonstrating that no state remedies remained available at the time his or her federal habeas petition was filed. Engle v. Isaac, 456 U.S. 107, 125 n. 28, 102 S. Ct. 1558, 1570 n. 28, 71

L. Ed. 2d 783 (1982); White v. Lewis, 874 F.2d 599, 602 (9th Cir. 1989). "[I]n determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his [or her] claim;" that is, federal courts look to state procedural rules in determining whether state remedies are available to the petitioner. Harris v. Reed, 489 U.S. 255, 268, 109 S. Ct. 1038, 1046, 103 L. Ed. 2d 308 (1989) (O'Connor, J. concurring, joined by The Chief Justice and Scalia, J.); Harmon v. Ryan, 959 F.2d 1457 (9th Cir. 1992) (per curiam).

A petition for writ of habeas corpus under 28 U.S.C. § 2254(b) requires a petitioner to exhaust available remedies in state court, unless there exists an absence

of corrective processes or "circumstances rendering such process ineffective to protect the rights of the prisoner." Put another way, before a federal court may conclude that a petitioner has exhausted state remedies by demonstrating that no state remedies remain available, the court must inquire why state remedies are not available. Buffalo v. Sunn, 854 F.2d 1158, 1162 (9th Cir. 1988). If there is simply an absence of a corrective process or circumstances render a corrective process inadequate, then a federal court is compelled to reach the merits of the petitioner's claim. See Russell v. Rolfs, 893 F.2d 1033, 1036-37 (9th Cir. 1990), cert. denied, Rolfs v. Russell, ___ U.S. __, 111 S. Ct. 2915, 115 L. Ed. 2d 1078 (1991). If, however, "state remedies are not available because the petitioner failed to comply with state procedures and thereby

prevented the highest state court from reaching the merits of his [or her] claim, then a federal court may refuse to reach the merits of that claim as a matter of comity." Buffalo, 854 F.2d at 1163. This failure to comply with reasonable state procedures is usually characterized as a "procedural default," "procedural bar," or a "waiver." As will be discussed below, exhausting state remedies by means of a procedural default is onerous and often unavailing.

The burden is on the petitioner to show he or she has properly exhausted each claim. Dismissal of the petition is proper when the record does not show that the exhaustion requirement is met. See Cartwright v. Cupp, 650 F.2d 1103, 1004 (9th Cir.) (per curiam), cert. denied, 455 U.S. 1023, 102 S. Ct. 1722, 72 L. Ed. 2d 142 (1982). Furthermore, a mixed petition--those containing both exhausted and unexhausted claims--may not be

considered by a federal court. Rose, 455 U.S. at 510, 102 S. Ct. at 1199. Because a petitioner risks subsequent federal habeas petitioner being summarily dismissed as "successive petitions" or "abuses of the writ," a petitioner is best served by bringing all his or her federal habeas claims in a single federal habeas petition.[3] See McCleskey v. Zant, 499 U.S. ___, ___, 111 S. Ct. 1454, 1468, 113 L. Ed. 2d 517 (1991); Rule 9, Rules Governing Section 2254 Cases in the United States District Courts.

B. Procedural Default

It is a well-established principle of federalism that the Supreme Court "will not review a question of federal law decided by a state court if the decision of that court

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[3]Cf. Howard v. Lewis, 905 F.2d 1318, 1321 (9th Cir. 1990) (dismissal of federal habeas petition on ground of state procedural default is determination "on the merits" for purposes of successive petition doctrine).

rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, ___ U.S. ___, ___, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991). "This rule applies whether the state law ground is substantive or procedural." Id. The independent and adequate state ground doctrine not only applies in the Court's review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners filing federal habeas claims. ____ U.S. at ____, 111 S. Ct. at 2554. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 81, 97 S. Ct. 2497, 2503, 53 L. Ed. 2d 594 (1977). The Court clarified in Wainwright that this doctrine extends to preclude a federal court's review where a state court's decision holds that a petitioner procedurally defaulted in presenting a

claim, the federal court may not review the merits of the claim in a federal habeas proceeding. However, this bar to federal review is not absolute.

Under Wainwright and its progeny, an adequate and independent finding of procedural default by a state court will bar federal habeas review, unless the petitioner can show "cause" for the default and "prejudice attributable thereto," Engle, 456 U.S. at 129, 102 S. Ct. at 1572-73, or demonstrate that failure to consider the federal claim will result in a "fundamental miscarriage of justice." 456 U.S. at 135, 102 S. Ct. at 1573-76.

While the issue of procedural default is separate from the question of exhaustion of state court remedies, Engle, 456 U.S. at 125 n. 28, 102 S. Ct. at 1570-71 n. 28, it is nonetheless closely related. The state remedies which must be exhausted are only

those which remain available at the time a federal habeas petition is filed. Id. If the unavailability of state remedies is in no way the fault of the petitioner or his or her counsel, the exhaustion requirement will likely be satisfied and a federal court may reach the merits of the petitioner's habeas claim. In many cases, however, the lack of available state remedies is a direct result of the petitioner's failure to avail himself or herself of state remedies in a timely or procedurally correct manner. In such instances, the petitioner has procedurally defaulted.

A procedural default, for the most part, will not bar consideration of the merits of a habeas claim in a federal proceeding, unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a procedural bar. Harris, 489 U.S.

at 265, 109 S. Ct. at 1044. This concept is known as the "plain statement rule." 489 U.S. at 261, 109 S. Ct. at 1043; Russell, 893 F.2d at 1036; Anselmo v. Sumner, 882 F.2d 431, 433 (9th Cir. 1989). See Cavanaugh v. Kincheloe, 877 F.2d 1443, 1450 (9th Cir. 1989). In a federal habeas proceeding, if the decision of the last state court to which a petitioner presented his or her federal claims "fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate ground, a federal court may address the petition." Coleman, ____ U.S. at ____, 111 D. Ct. at 2557.[4] Conversely, where a state court

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[4]This rule does not apply if a petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his or her claim in order to meet the exhaustion requirement would now find the claim procedurally

clearly and expressly states that consideration of a federal constitutional claim is barred because of an adequate and independent state law ground, federal review of a claim's merits is foreclosed notwithstanding the fact that relief was also denied on the merits in an alternative holding. Harris, 489 U.S. at 255, 109 S. Ct. at 1043. The mere fact that a petitioner failed to follow a state procedural rule does not in and of itself prevent federal review of a claim's merits;

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barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented the claim. See Harris, 489 U.S. at 269-270, 109 S. Ct. at 1046-47 (O'Connor, J., concurring); Teague v. Lane, 489 U.S. 288, 297-298, 109 S. Ct. 1060, 1067-68, 103 L. Ed. 2d 334 (1989). As a result, a federal court need not require that a habeas claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred. 489 U.S. at 263 n. 9, 109 S. Ct. at 1043 n. 9.

for a procedural bar to exist, the state court must actually have relief on an "adequate and independent" state ground for disposing of the claim. See Ylst v. Nunnemaker, ___ U.S. ___, 111 S. Ct. 2590, 2593, 115 L. Ed. 2d 706 (1991) ("State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review ;that might otherwise have been available"). This rule is intended to apply when there is an ambiguity in a state court's judgment. Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 96, 112 L. Ed. 2d 68 (1990). Thus, as the Court concluded in Ylst:

> [W]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders

> upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," Coleman, ___ U.S. at __, 111 S. Ct. at 2559, we will presume that no procedural default has been invoked by a subsequent unex-plained order that leaves the judgment or its consequences in place. Similarly where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

___ U.S. at ___, 111 S. Ct. at 2594.

However, where it is shown that at the time of filing the habeas petition, the petitioner had no state remedies available under 28 U.S.C. § 2254(b) by which he or she could fairly present federal constitutional claims to the state's highest court, and it is also shown that the reason for the unavailability of such state remedies is petitioner's procedural default, the petitioner may not obtain federal review of his or her claim absent a showing of "cause

and prejudice" sufficient to excuse such default.[5] Reed v. Ross, 468 U.S. 1, 11, 104 S. Ct. 2901, 2908, 82 L. Ed. 2d 1, 12 (1984); Wainwright, 433 U.S. at 90-91, 97 S. Ct. at 2508; Mcquown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). See Teague, 489 U.S. at 298, 109 S. Ct. at 1068; Francis v. Henderson, 425 U.S. 536, 542, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976); Tacho v. Martinez, 862 F.2d 1376, 1380 (9th Cir. 1988). "Cause" is the legitimate excuse for the default. Thomas v. Lewis, 945 F. 2d 1119, 1123 (9th Cir. 1991). "Prejudice" is actual harm resulting from the alleged constitutional violation. Id.

"Because of the wide variety of contexts in which a procedural default can

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[5]Appellate defaults are examined under the same standards that apply when a defendant fails to preserve a claim during trial. Smith v. Murray, 477 U.S. 527, 533, 106 S. Ct. 2661, 2665-66, 91 L. Ed. 2d 434, 443-44 (1986).

occur, the Supreme Court 'has not given the term "cause" precise content.'" Harmon, 894 F.2d at 1274 (quoting Reed, 468 U.S. at 13, 104 S. Ct. at 2902). In Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2646, 91 L. Ed. 2d 397 (1986), the Court explained that "a showing that the factual or legal basis for a claim was not reasonably available . . ., or that 'some interference by officials made compliance impracticable, would constitute cause under this standard." See Allen v. Risley, 817 F.2d 68, 69, (9th Cir. 1987). The Court has suggested, however, that cause should ordinarily turn on some objective factor external to the petitioner. Carrier, 477 U.S. at 488, 106 S. Ct. 2645; Harmon, 894 F.2d at 1275. The standard is one of discretion intended to be flexible and yielding to exceptional circumstances. Hughes v. Idaho State Board

of Corrections, 800 F.2d 905, 909 (9th Cir. 1986).

Finally, it is worth noting that the "cause and prejudice" standard is equally applicable to pro se litigants, Harmon, 894 F.2d at 1274; Hughes, 800 F.2d at 908, whether literate and assisted by "jailhouse lawyers," Tacho, 862 F.2d at 1381, illiterate and unaided, Hughes, 800 F.2d at 908, or non-English speaking, Vasquez v. Lockhart, 867 F.2d 1056, 1058 (8th Cir. 1988), cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

In the instant matter, Petitioner failed to "fairly present" his claims to the "highest state court;" in other words, Petitioner procedurally defaulted in presenting his claims to the state courts. Initially, Petitioner failed to file a petition for review by the Arizona Supreme Court on direct appeal.

Next, on collateral review, the trial court "clearly and expressly" relied on an "adequate and independent" state law basis to deny the petition for post-conviction relief; the court observed that Petitioner either raised his claims on direct appeal or he could have raised his claims on direct appeal, but he "knowingly and voluntarily" waived his right to do so. Harris, 489 U.S. at 261, 109 S. Ct. at 1043.

The Arizona Court of Appeals held that the petition was precluded under Rule 32.6(c), Arizona Rules of Criminal Procedure.[6] The intent of this rule is to

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[6]Rule 32.6(c), Arizona Rules of Criminal Procedure, states in pertinent part:

> If, upon reviewing the petition, response, reply, files and records, and disregarding defects of form, it determines that no material issues of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, it

allow the court to dispose of "no merit" petitions for post-conviction relief. State v. Suarez, 23 Ariz.App. 45, 530 P.2d 402, 403 (1975). This Court finds that the court of appeals' opinion clearly expresses the intent to uphold and rely upon the trial court's decision that the petition was precluded by state law.

After reviewing Petitioner's petition for review, the Arizona Supreme Court denied the petition in a one-line order. The Ninth Circuit determined in Dickey v. Lewis, 859 F.2d 1365, 1368 (9th Cir. 1988), that the Arizona Supreme Court's denial, without explanation, of a petition for review is presumed to include acceptance of the reasoning, as well as, the judgment of the trial court denying a petition for post-conviction relief. See Harmon, 894 at 1273.

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may order the petition dismissed....

Although the practice of one-line orders is often criticized, as it should be, the intent of the state supreme court in this case is clear; that is, the court accepted the state court of appeals' disposition of the petition.

This Court finds that Harris is applicable and that the state court of appeals and supreme court clearly expressed affirmation of the trial court's decision that the petition for post-conviction relief was precluded under state law.

Petitioner has failed to "fairly present" each of his claims to the "state's highest court." Petitioner failed to file a petition for review and his petition for post-conviction relief was denied on state law grounds; thus, Petitioner procedurally defaulted. However, because Respondents assert that Petitioner has procedurally defaulted with respect to his eighth and

fourteenth amendment claims only, Respondents have waived Petitioner's procedural defaults with respect to his fourth and sixth amendment claims. Hughes, 800 F.2d at 906, n. 1. See Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990); Batchelor v. Cupp, 693 F.2d at 864.

A return to state court in an attempt to obtain review on the merits of Petitioner's eighth and fourteenth amendment claims would be futile in the instant case. Petitioner had ample opportunity but failed to fairly present these claims to the state supreme court. Further, pursuant to State v. Sandon, 161 Ariz. 157, 777 P.2d 220 (1989), issues that could have been raised before the court of appeals are no longer open to substantive review by the state courts unless the Petitioner's claims fit within one of the exceptions in Rule 32.1 §§ (d), (e) or (g), Arizona Rules of Criminal

Procedure.[7] Sandon, 161 Ariz. at 158, 777 P.2d at 221. This Court's review of Rule 32.1 reveals that none of these exceptions apply to Petitioner's eighth or to his fourteenth amendment claims. The unavailability of state remedies renders

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[7]The pertinent sections of Rule 32.1 provide:

* * *

d. He is being held in custody after sentence has expired;
e. Newly-discovered material facts exist, which the court, after considering:
(1) The probability that such facts, if introduced would have changed the verdict, finding or sentence;
(2) The diligence which would have been required to discover and produce the evidence at trial;
(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts, may require that the conviction or sentence be vacated.

* * *

g. There has been a significant change in the law applied to the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard.

these two claims exhausted. Matias v. Oshiro, 683 F.2d 318, 320 (9th Cir. 1980).

Nevertheless, because the reason for the unavailability of state remedies is Petitioner's failure to fairly present these two claims to the state supreme court and, therefore, because of Petitioner's procedural defaults, Petitioner must show "cause" for and "prejudice" from his defaults. Reed, 468 U.S. at 11, 104 S.Ct. at 2908; McQuown, 795 F.2d at 809.

Petitioner alleges, as "cause" for his procedural defaults, his counsel's failure to pursue his claims on appeal. Ineffective assistance of counsel may be sufficient cause to excuse procedural default. Carrier, 477 U.S. at 488-489, 106 S. Ct. at 2445-46; Paradis v. Arave, 954 F.2d 1483, 1493. However, defense counsel has no duty to raise every non frivolous claim on appeal. Evitts v. Lucey, 469 U.S. 387, 394,

105 S. Ct. 830, 835, 83 L. Ed. 2d 821 (1985); Jones v. Barnes, 463 U.S. 745, 751 103 S. Ct. 3308, 3312, 77 L. Ed.2d 987 (1983). The mere fact that counsel failed to recognize or raise a claim does not constitute cause for procedural default. Carrier, 477 U.S. at 486-88, 106 S. Ct. at 2644-45. "The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule."[8] Id. Petitioner fails to meet this test for cause.

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[8]The Supreme Court enumerated two examples of ineffective assistance of counsel as cause:

(1) the claim was not reasonably available to counsel and
(2) "some interference by officials made compliance impracticable."

Id.

In addition, a claim of ineffective assistance of counsel must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. Id. at 489, 106 S. Ct. at 2646. Petitioner has failed to present the state courts with a claim of ineffective assistance of appellate counsel for failure to assert his eighth and fourteenth amendment claims on direct appeal.

Moreover, Petitioner has failed to explain why his appellate counsel did not present these two claims to the state supreme court on direct appeal. Nor has Petitioner suggested any other cause for this default. Ineffective assistance of counsel, under the circumstances presented in this case, fails to establish cause.

In light of Petitioner's failure to establish cause for his procedural default,

the court need not consider whether Petitioner has shown actual prejudice resulting from the alleged constitutional violations. Carrier, 477 U.S. at 533, 106 S. Ct. at 2666.

Finally, failure to establish cause may be excused under exceptional circumstances:

> [I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of showing cause for the procedural default.

Carrier, 477 U.S. at 496, 106 S. Ct. at 2650. Petitioner has not established such an extraordinary case. Petitioner's failure to establish cause for his procedural default, therefore, precludes this Court from reviewing the merits of his eighth and fourteenth amendment claims. As a result, this Court shall consider Petitioner's fourth and sixth amendment claims only.

FOURTH AMENDMENT CLAIM

Petitioner first contends that his conviction is unconstitutional because it is based upon physical evidence seized as a result of a digital rectal cavity search; that is, because of evidence seized in violation of Petitioner's fourth amendment right against unreasonable searches and seizures. This claim should be denied.

Relief pursuant to a writ of habeas corpus is not available in the absence of a federal constitutional violation. Mitchell v. Goldsmith, 878 F.2d 319, 314 (9th Cir. 1989). Petitioner's allegation that the state violated his fourth amendment right fails to allege a federal constitutional violation permitting relief via a petition for writ of habeas corpus in federal district court. Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed.2d 1067 (1976); Gordon v. Duran, 895 F.2d 610, 613-

14 (9th Cir. 1990); Miller v. Keeney, 882 F.2d 1428, 1431 (9th Cir. 1989); Mitchell, 878 F.2d at 323; Terravona v. Kincheloe, 912 F.2d 1176, 428 (9th Cir. 1990), cert. denied __ U.S. ___, 111 S. Ct. 1631, 113 L. Ed.2d 726 (1991).

In Powell, the Supreme court was asked whether state prisoners, having been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review, may invoke such a claim on federal habeas review. Weighing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims, the Court concluded that where a state provides

> an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an

> unconstitutional search or seizure was introduced at his trial.

Powell, 428 U.S. at 494, 96 S. Ct. at 3052

The court further concluded that:

> In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.

Id. at 495, 96 S. Ct. at 3052-53.

Petitioner herein was provided an opportunity for full and fair litigation of his fourth amendment claim in state court. Although Petitioner's trial counsel failed to raise this claim at trial, this does not refute the fact that Petitioner had an opportunity at trial and on direct appeal to raise this claim. This claim should be denied.

However, this Court is mindful of the relationship of this claim to Petitioner's claim of ineffective assistance of counsel. As discussed below, analysis of Petitioner's

claim of ineffective assistance of counsel will necessitate the evaluation of the merits of Petitioner's Fourth Amendment claim.

SIXTH AMENDMENT CLAIM

Claims of ineffective assistance of counsel are analyzed pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). The two part test established in Strickland also applies to guilty plea challenges based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See Tinsley v. Borg, 895 F.2d 520, 531-32 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 974, 112 L. Ed.2d 1059 (1991); Iaea v. Sunn, 800 F.2d 861, 864 (9th Cir. 1986); Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985). In order for Petitioner to prevail on his ineffective assistance claims, he must show:

> 1. That counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2065; United States v. Solomon, 795 F.2d 747, 749 (9th Cir. 1986); and
>
> 2. That there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Hill, 474 U.S. at 58, 106 S. Ct. at 370; Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Solomon, 795 F.2d at 749.

This two-prong test poses a mixed question of law and fact. Strickland, 466 U.S. at 698, 104 S. Ct. at 2070; United States ex rel. Simmons v. Gramley, 915 F.2d 1128, 1133 (7th Cir. 1990). "[A] state court's specific factual findings made in the course of deciding an ineffective assistance of counsel claim," however, "are presumed correct pursuant to 28 U.S.C. § 2254(d)."[9]

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[9]In a habeas proceeding, the presumption of correctness afforded state court factual determinations can only be overcome by convincing evidence. Kennick v. Superior Court of California, 736 F.2d 1277, 1281 (9th Cir. 1984).

Couch v. Trickey, 892 F.2d 1338, 1341 (8th Cir. 1989) (citing Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed.2d 722 (1981)). See Haley v. Armontrout, 924 F.2d 735, 739-40 (8th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 135, 116 L. Ed.2d 101 (1991); Carter v. Collins, 918 F.2d 1198, 1202 (5th Cir. 1990). A petitioner seeking to overturn his conviction on the grounds of ineffective assistance of counsel must demonstrate by preponderance of the evidence that he was deprived of constitutionally effective assistance. Trass v. Maggio, 731 F.2d 288, 292 (5th Cir. 1984); Allen v. Montgomery, 728 F.2d 1409, 1414 (11th Cir. 1984); United States v. Simpson, 475 F.2d 934, 935 (D.C. Cir.), cert. denied, 414 U.S. 873, 94 S. Ct. 140, 38 L. Ed.2d 91 (1973); Mone v. Robinson, 430 F.Supp. 481, 484 (D.Conn.), aff'd, 573 F.2d 1293 (1977).

The court hearing an ineffectiveness claim must consider the totality of the evidence with an eye toward the ultimate issue of whether counsel's conduct so undermined the functioning of the adversarial process that the proceedings lacked fundamental fairness. Strickland, 466 U.S. at 686, 696, 104 S. Ct. at 2064, 2069. Cf. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed.2d 123 (1986) (ineffective assistance of counsel may not be grounded on the failure of counsel to produce false or misleading evidence); Card v. Dugger, 911 F.2d 1491 (11th Cir. 1990) (observing that counsel cannot be labeled ineffective for failing to raise issues which have no merit). Reasonableness is judged from counsel's perspective at the time of the alleged error in light of all the circumstances. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The governing

legal standard in assessing the prejudice from counsel's errors is whether, in the absence thereof, the finder of fact would have had a reasonable doubt respecting guilt. 466 U.S. at 695, 104 S. Ct. at 2068-69. See, e.g., Smith v. Dugger, 911 F.2d 494, 497 (11th Cir. 1990) (because trial counsel failed to move to suppress his client's confessions, the state's case was not subjected to the meaningful adversarial testing which is required in our system of justice). In other words, the petitioner must show that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Hill, 474 U.S. at 58, 106 S. Ct. at 370. See also United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984), cert. denied, Schaflander v. United States, 470 U.S. 1058, 105 s.Ct. 1772, 84 L. Ed.2d 832 (1985) (no ineffective assistance

of counsel when testimony of uncalled witnesses is only cumulative; petitioner must show prejudice); Gustave v. United States, 627 F.2d 901, 904 (9th Cr. 1980) (mere criticism of trial tactic not sufficient to support charge of ineffective assistance of counsel). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. See Smith, 911 F.2d at 497. In Strickland, the Supreme Court also held that a convicted defendant must specify the particular act or omission with which his counsel is charged. 466 U.S. at 690, 104 S. Ct. at 2066. The particular

act or omission must then be evaluated in light of the particular facts and circumstances of the case, keeping in mind that there is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance, including what may be considered strategy.[10] 466 U.S. at 689-90, 104 S. Ct. at 2065-66. See,

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[10]It is noteworthy that often an assessment of either the alleged deficiency in counsel's performance or the resulting prejudice arising therefrom will require that the court evaluate the merits of an underlying claim. As stated previously, counsel is not to be faulted for failing to raise issues reasonably considered to be without merit. If the underlying claim is without merit, the petitioner cannot show either deficient performance or prejudice. See, e.g., Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990), cert. denied, _ U.S. ___, 111 S. Ct. 138, 112 L. Ed.2d 105 (1990) (the court concluded that an assessment of petitioner's claim that counsel was ineffective for not raising on appeal the trial court's denial of his right to represent himself required that the court first evaluate the merits of petitioner's claim that the trial court denied a proper assertion of the right to self representation).

e.g., United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir.), cert. denied, Harden v. United States, 488 U.S. 910, 109 S. Ct. 264, 102 L. Ed.2d 252 (1988) (decision whether to call witness is matter of trial strategy). The Court set out the relationship between adequate investigation and strategic or tactical choices as follows:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of the investigation. In other words, counsel has a ;duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91, 104 S. Ct. at 1066.

See also Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir.), cert. denied, 493 U.S. 945, 110 S. Ct. 353, 107 L. Ed.2d 340 (1989) (a reasonably competent attorney often must rely on his own experience and judgment, without the benefit of a substantial investigation, when deciding whether or not to forego a particular line of investigation); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987), cert. denied, 487 U.S. 1241, 108 S. Ct. 2915, 101 L. Ed.2d 946 (1988) (where counsel has no cause to suspect that additional medical evidence would lead him to reassess his conclusion, counsel's decision not to pursue additional medical evidence was reasonable); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (where counsel's failure to present any evidence on mitigation of sentence, counsel's failure to investigate mental condition could not be construed as a trial

tactic). "To do no investigation at all on an issue that not only implicates the accused's defense, but also his present competency, is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum." Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990). In short, a tactical decision to limit investigation must flow from counsel's informed judgment. Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 573, 107 L. Ed. 2d 568 (1989). Accordingly, the court in Bouchillon concluded that "[i]t must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems." Id.

Courts have nonetheless, consistently held that a petitioner alleging that

counsel's ineffectiveness was centered on a supposed failure to investigate has the burden of providing the court sufficiently precise information of a constitutional deprivation; that is, a comprehensive showing as to what the investigation would have produced. See, e.g., Gramley, 915 F.2d at 1134 (the court found that because petitioner gave purely speculative allegations, rather than specific details, concerning counsel's failure to investigate potential defenses, his claim of ineffective assistance lacked merit); United States v. Muehlbauer, 892 F.2d 664, 669 (7th Cir. 1990) (defendant failed to demonstrate what evidence was available as well as what testimony witnesses might have offered); United States v. Grewal, 825 F.2d 220, 223 (9th Cir. 1986) (defendant was not denied effective assistance of counsel due to his appointed attorney's failure to present a

defense, absent showing of what evidence should have been presented).

In essence, the court's scrutiny of counsel's performance is highly deferential. Moreover, cursory allegations that are purely speculative cannot support a claim of ineffective assistance of counsel.

Petitioner alleges that his counsel was ineffective for not moving to suppress evidence obtained by the digital rectal examinations, on the basis that the searches were unreasonable under the Fourth Amendment. Respondents argue that the status of the law at the time was such that Petitioner's trial counsel was justified in not filing a motion to suppress. However, Respondents' argument must fail under Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988), cert. denied, 490 U.S. 1012, 109 S. Ct. 1655, 104 L. Ed. 2d 169. In Vaughan, the Ninth Circuit specifically addressed the

issue raised by Respondents as a defense herein and decided adversely to Respondents:

> We hold that it was clearly established by 1984 that body cavity searches of inmates must be conducted in a reasonable manner, and that issues of privacy, hygiene, and the training of those conducting the searches are relevant to determining whether the manner of search was reasonable. It was also clear that the place in which the search was conducted must be considered in judging the searches reasonableness. Wolfish, 441 U.S. at 559, 99 S. Ct. at 1884-85.

859 F.2d at 741.

Respondents' reliance upon state court trial rulings and appellate decisions on issues of federal constitutional rights is misplaced in light of Vaughan.

Turning now to the merits of Petitioner's ineffective assistance of counsel claim, this Court must consider whether a motion to suppress would have been granted in Petitioner's trial below. The digital rectal cavity searches of Petitioner which resulted in finding contraband took

place on March 15, 1984; therefore, this Court's focus will be solely on that search.[11]

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447 (1979).

Although probable cause for the search has not been raised as an issue in this case, this Court finds that the justification for the searches to be relevant. Internal security in a prison

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[11]Petitioner was subjected to later digital cavity searches on March 22 and 23, 1984. However, no contraband was found during those searches.

setting has been recognized as a paramount goal.

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."
>
> * * * *
>
> Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel to present escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in light of the central objective of prison administration safeguarding institutional security.

Wolfish, 441 U.S. at 546-547, 99 S. Ct. at 1878 (citations and footnote omitted).

In this case, prison officials had received information that inmates in Cell Block 6 were concealing high grade

explosives in their rectums. (Transcript, Vaughan v. Ricketts, February 22, 1990, Thompson testimony, page 51, line 4 through page 55, line 3).[12] Evidence of the contraband was provided to the prison officials by an informant. (Id., at page 55, line 3 through page 57, line 10). According to the informant, the inmates in Cell Block 6 intended to stage an incident for the purpose of luring in the prison guards into a particular pod and bombing them. (Id., at page 58, line 15 through page 59, line 4; page 63, line 21 through page 66, line 1). The bombs would be made with the explosives, blasting caps and "schrapnel" material. (Id. at page 64, lines 4-21). According to the informant, this incident was to take place shortly.

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[12]References to the Vaughan v. Ricketts trial transcript shall hereinafter be referred to as Vaughan TR.

(Id., at page 53, line 15 through page 54, line 10).

The Ninth Circuit's decision in Vaughan identified a number of alleged factors which, if true, would render the searches unreasonable.

1. The medical assistants were untrained in involuntary body cavity searches.

2. The medical assistants did not wash their hands between searches.

3. The area where the searches were conducted were clearly visible to other inmates and prison personnel.

4. Prison personnel made jokes and insulting comments.

5. No official made an inspection of medical records to insure that individual inmates did not have medical conditions that made the searches dangerous.

6. Inmates who resisted were forced to submit.

7. At least one inmate search repeated later in the medical united was visible to female personnel.

> 8. The search was conducted in an unsanitary hallway and on a table which was uncovered and unsanitary.

859 F.2d at 741.

The record shows that the corrections medical assistant (CMA) who performed the digital rectal cavity search on Petitioner was a military medic who had received specific training in conducting body cavity examinations. He had performed such examinations twice during his career. (Vaughan TR, February 27, 1990, LaRue testimony, page 108, line 5 through page 109, line 18). The evidence also shows that the procedure to be used is the same whether the body cavity search is voluntary or involuntary. (Vaughan TR, February 14, 1990, Beatty testimony, page 85, line 25 through page 86, line 6; February 27, 1990, Harlan testimony, page 143, lines 12-16; page 155, lines 10-18). This Court finds that the evidence supports the conclusion

that the digital rectal cavity search was performed on Petitioner by a properly trained medical assistant. See, Daughtery v. Harris, 476 F.2d 292, 295 (10th Cir. 1973), cert. denied, 414 U.S. 872, 94 S. Ct. 112, 113, 38 L. Ed. 2d 91 (1973) (examinations were carried out by trained paraprofessional medical assistants).

The area in which the examination took place did not have washing facilities and the CMA did not wash his hands in between searches. (Evidentiary Hearing, February 25, 1992, Lowry testimony, page 30, lines 15-21).[13] However, the CMA used a glove on the hand with which he performed the search; his ungloved hand did not touch the inmate at any time during the search. The glove was changed in between searches. There was

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[13]References to the transcript of the evidentiary hearing conducted by this Court shall hereinafter be cited at Evid. HR).

medical testimony supporting the manner in which the examination was conducted using gloves. (Vaughan TR, Harlan supra, at page 145, line 3 through page 146, line 5). This Court finds that the CMA's failure to wash his hands in between searches was cured by the use of the gloves and was not so unreasonable as to amount to a constitutional violation.

The evidence supports a conclusion that the searches were not visible to other inmates. The hallway in which the search was conducted was chosen by security staff as one of the only places where the searches would not be observed by inmates. (Vaughan TR, February 20, 1990, Jolley testimony, page 59, lines 2-25; page 78, 4-6; Evid. HR, Lowry, supra, page 67, lines 15-19). There is some evidence that the search was visible to other prison personnel. Petitioner testified that there were at least three

other people in a hallway on the other side of the door from where the search took place and who observed another inmate being searched. (Evid. HR, Lowry, supra, at page 26, lines 3-25). However, it appears that in the hallway where the search took place, there was only Petitioner, the CMA, the guards holding Petitioner while the search was conducted, a supervisor and perhaps a representative from Intelligence Investigations. (Deposition of Tristam Anderson, June 13, 1986, page 20, lines 6-21). This Court does not find that the observation of the search by other prison personnel to be so extreme as to warrant the conclusion that Petitioner's Fourth Amendment rights have been violated. The circumstances necessitating the search justified having a significant number of prison personnel involved. Even Petitioner's corrections expert testified

that if an inmate were resisting a search, it would be necessary to have as many as five or six security officers present. (Vaughan TR, February 28, 1990, Mintzes testimony, page 54, lines 1-9). There is no evidence that there were unnecessary persons in the prison unit or that their observation of the searches was more that incidental to the functions they were to serve.

Although Petitioner claims that prison personnel made jokes and derogatory remarks, the evidence is to the contrary. During the Vaughan trial, Petitioner testified that none of the people standing around while he was being searches on March 15, 1984, said anything. (Vaughan TR, February 12, 1990, Lowry testimony, page 105, lines 10-14).[14]

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[14]Although Petitioner later testified at the evidentiary hearing held by this Court that derogatory remarks were being made, he admitted that the passage of time had left him confused. (Evid. Hr. page 27, line 13 through page 28, line 9).

Mr. Grijalva, the warden of Cell Block 6, testified that he did not hear any jokes or insulting comments from the guards towards the inmates during the search. (Vaughan TR, February 21, 1990, Grijalva testimony, page 63, line 24 through page 64, line 5).

While it is true that a check of Petitioner's medical records was not made prior to the digital rectal cavity search in question, Petitioner has not produced any evidence that he had a medical condition that would make such a search dangerous. Furthermore, there was evidence from medical professionals showing that it was not absolutely necessary to check the inmate's medical records prior to conducting the rectal search. (Vaughan TR, Harlan, supra, at page 146, line 12 through page 148, line 5). Therefore, this Court finds that Petitioner was not prejudiced in any way by the failure to check his medical records.

It is not disputed that Petitioner did not consent to the digital cavity search; however, the question is whether the amount of force used and the manner in which the search was conducted was unreasonable. The record reveals that the search was conducted in an appropriate manner and with a reasonable amount of force justified by the circumstances. When Petitioner stepped back from the table, two guards pushed him back down. (Vaughan TR, Lowry, supra, at page 103, lines 4-18). Dr. Scalzo, the prison medical administrator, testified that an involuntary body cavity search could be performed while the inmate was being restrained. (Vaughan TR, February 14, 1990, Scalzo testimony, page 43, line 4 through page 44, line 25). According to Ellis McDougall, a corrections expert, it was appropriate in this case to conduct a digital rectal cavity search on inmates who

did not consent. He further testified that the amount of force used in this case was both reasonable and necessary. (Vaughan TR, February 26, 1990, McDougall testimony, page 39, line 13 through page 40, line 24). The position in which Petitioner was held was appropriate for conducting the search. (Vaughan TR, Harlan, supra, at page 142, lines 14-25). According to the CMA who conducted the search, none of the inmates screamed or cried out in pain. (Vaughan TR, LaRue, supra, at page 107, lines 1-5). The search was done with a gloved and lubricated finger and took only a matter of seconds. (Vaughan TR, Grijalva, supra, at page 64, line 14 through page 65, line 4; LaRue, supra, at page 105, line 23 through page 106, line 21). The guard who transported Petitioner to the Central Health Unit (CHU) testified that he did not observe any struggle or use of force on Petitioner.

(Vaughan TR, February 26, 1990, Morrow testimony, page 78, line 23 through page 79, line 3).

Petitioner alleges that he complained of rectal pain and bleeding after the search and that his anal fistula was the result of the forced rectal examination; thus, he asserts, this is evidence that the search was conducted with an unreasonable amount of force. However, the record shows that Petitioner did not complain of rectal pain or bleeding at the time of the search. (Vaughan TR, February 26, 1990, Leff testimony, page 208, lines 15-18; Holiday testimony, page 254, line 23 through page 255, line 4). When he did complain of rectal pain, it was a month later and involved an abscess on his rectum. (Vaughan TR, Holiday, supra, at page 255, line 5 through page 256, line 2).

There was also medical testimony that Petitioner's rectal problems was more likely caused by the insertion of a foreign object into his rectum rather than from the digital rectal cavity search. (Vaughan TR, Jolley, supra, at page 89, lines 9-18; February 21, 1990, Venkatesh testimony, page 163, line 6 through page 164, line 1; Leff, supra, at page 201, lines 12-15; page 203, lines 6-15; page 207, lines 1-15; page 209, line 10 through page 210, line 19; Harlan, supra, at page 150, line 21 through page 151, line 15).

Petitioner was the inmate noted by the Vaughan court whose search at the CHU was allegedly visible to female personnel. After being taken to the CHU, Petitioner was x-rayed and taken to a small room and ordered to defecate. (Vaughan TR, Lowry, supra, at page 113, line 17 through page 115, line 23). After defecating one item,

Petitioner was taken to an examining room and Dr. Carvalho conducted a digital rectal search. (Transcript, State v. Lowry, May 27, 1987, Cordova testimony, page 10, line 17 through page 11, line 2). During that search, the door to the examining room was open and Lowry observed a female doctor and a female physician's assistant pass by. (Evid. HR, Lowry, page 66, line 12 through page 67, line 2).[15]

This Court does not find a constitutional violation from the possible view of petitioner by female prison personnel during the rectal examination. In Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985), prison inmates challenged the correctional policy and practice which allowed female guards to observe male

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[15]There is no evidence that the two female personnel observed Petitioner during the search.

inmates in states of partial or total nudity while dressing, showering, being strip searched or using toilet facilities. 779 F.2d at 492. The court observed that in reference to body searches, the female guards were not usually assigned to such duties but did have occasion to observe such searches in emergency situations. While the court recognized a right of privacy in shielding one's naked body from view of the opposite sex, it could not find a constitutional violation under those circumstances. 779 F.2d at 494-495. See also, Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988) ("assigned positions of female guards that require only infrequent and casual observation or observation at a distance and that are reasonably related to prison needs are not so degrading as to warrant court interference.").

Finally, this Court observes that the evidence is undisputed that the table upon which the examination took place was not covered or cleaned between searches and that the hallway was not "sanitized" prior to the search taking place. (Vaughan TR, LaRue, supra, at page 107, lines 11-19). However, there is no evidence that the area was so contaminated as to constitute a health hazard.

A balance of the justification for the search and the manner and scope in which the search was conducted leads this Court to the conclusion that Petitioner's Fourth Amendment rights were not violated. Therefore, any motion to suppress the contraband found on Petitioner would not have been granted. Accordingly, this Court does not find that Petitioner received ineffective assistance of counsel.

IT IS THEREFORE RECOMMENDED that Petitioner's eighth and fourteenth amendment claims be dismissed from the petition for Petitioner's failure to show "cause" for and "prejudice" from his procedural defaults. See Howard v. Lewis, 905 F.2d 1318 (9th Cir. 1990).

IT IS FURTHER RECOMMENDED that Respondents' motion to dismiss the Petition for Writ of Habeas Corpus be granted.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days

within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 1 day of October, 1992.

/s/
MICHAEL MIGNELLA, JR.
U. S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BRUCE FOY LOWRY, Petitioner, v. SAM LEWIS, et al., Respondents.	)	CIV 90-0927 PHX CAM (MM) ORDER

On October 1, 1992, the Magistrate Judge issued a Report and Recommendation in this case. The parties have not filed Objections to the Recommendation. For the reasons set forth in the Magistrate Judge's Recommendation,

IT IS THEREFORE ORDERED THAT:

(1) The Recommendation is adopted by the Court.

(2) The Respondents' Motion to Dismiss (DOC 8) is granted.

(3) Petitioner's eighth and fourteenth amendment claims are dismissed from the petition for failure to show cause and

prejudice for procedural defaults. The Respondents' second Motion to dismiss (DOC #14) is granted. The petition for writ of habeas corpus is dismissed with prejudice.

Dated this 5 day of November, 1991.

/s/ C. A. Muecke
C.A. Muecke
U.S. District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE FOY LOWRY, Petitioner-Appellant, v. SAM LEWIS, et al., Respondents-Appellees.	No. 93-15267 D.C. No. CV-90-00927-CAM OPINION

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, District Judge, Presiding

Argued and Submitted
December 16, 1993--San Francisco, California

Filed April 7, 1994

Before: Cecil F. Poole, Robert R. Beezer
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

SUMMARY

**Criminal Law and Procedure/Right to Counsel/
Defendants and Accused, Rights of**

The court of appeals affirmed a district court denial of a habeas corpus petition. The court held that a lawyer who did research regarding a possible suppression motion, and talked to attorneys who had handled similar cases, did not render ineffective assistance by failing to file the suppression motion.

After a state prisoner told prison officials that fellow inmates were keeping contraband in their rectums in preparation for a riot, the officials arranged for searches of certain prisoners' rectums. After a medical assistant and doctor conducted the searches, appellant Bruce Lowry was ordered to expel foreign objects, which turned out to be a syringe and a balloon filled with methamphetamine. Lowry and other prisoners who were searched filed a civil rights suit, claiming that the

manner of the rectal search violated their constitutional rights.

Lowry was charged in state court with promoting prison contraband and possessing dangerous drugs. Lowry's attorney did legal research regarding a possible motion to suppress, and talked to lawyers representing inmates in other criminal cases based on evidence found in their rectums from the same cell-block search. Lawyers for the other inmates told Lowry's attorney that the motions to suppress filed in the other cases had all lost. Lowry's attorney did not file a motion to suppress the evidence from the rectal search. Lowry was convicted.

The district court denied Lowry's habeas corpus petition. He appealed, contending that he was denied effective assistance of counsel because his lawyer in the state contraband case did not file a motion to suppress the syringe and drugs.

Lowry argued that the evidence would have been suppressed because the manner in which the search was conducted violated his constitutional rights.

[1] Lowry did not establish deficient performance by his attorney. [2] Lowry's experienced defense lawyer knew from his research, and from the denial of suppression motions in other prisoners' criminal cases arising out of the rectum searches in this same disturbance, that the motion would lose. Thus, Lowry's lawyer did not render services that fell below the standard of reasonable professional judgment.

[3] In addition, Lowry failed to demonstrate a "reasonable probability" that, had his lawyer moved to suppress, the evidence would have been suppressed.

COUNSEL

JoJene E. Mills, Norris & Mills, Phoenix, Arizona, for the petitioner-appellant.

Joseph T. Maziarz, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee.

OPINION

KLEINFELD, Circuit Judge:

Lowry claims ineffective assistance of counsel because his lawyer did not move to suppress evidence. We Reject his claim.

I. Facts

An Arizona state prisoner told the prison warden that a number of his fellow inmates in cell block 6, the administrative segregation unit, planned a violent riot. The plan was to stab an inmate in order to lure a number of guards into the unit. The guards would then be deluged with bombs made from blasting caps, shrapnel, and about a

pound of explosives. The informant claimed the inmates kept contraband "keestered" in their rectums. He had decided to "snitch" and request a transfer when he learned "through the vent" that he was to be the inmate stabbed. He corroborated his story by expelling from his own rectum a balloon filled with gun powder.

The prison authorities arranged for searches of prisoners' rectums in the cell block. Fifteen inmates were taken from their cells. A medical assistant (wearing a new lubricated glove for each inmate) stuck his finger in each inmate's rectum. Then each inmate was moved to the medical facility in the unit and probed again, this time by a doctor. The doctor felt something in Lowry's rectum, had him x-rayed, and confirmed that a foreign object was there. Lowry was ordered to expel it, and he removed from his rectum a syringe wrapped in

cellophane. The doctor probed him again, decided there was more, and Lowry expelled a red balloon filled with methamphetamine.

Lowry was convicted in state court of promoting prison contraband and possessing dangerous drugs. This case is his appeal of the denial of his habeas corpus petition. He claims that he was denied effective assistance of counsel because his lawyer in the state contraband case did not file a motion to suppress the syringe and methamphetamine. Lowry contends that the evidence would have been suppressed because the manner in which the search was conducted violated his constitutional rights.

The ACLU had filed a lawsuit on behalf of the prisoners under 42 U.S.C. § 1983, claiming that the searches of their rectums

violated the prisoners' civil rights.[1] Counsel for Lowry knew about the suit, and knew his client was claiming in the civil suit that the manner of the search violated his constitutional rights.

Lowry's attorney did not file a motion to suppress the evidence from the rectal search in the criminal case. He had done legal research in other cases on the issues upon which his motion to suppress in this case would depend. He also talked to lawyers representing inmates in the other criminal cases based on evidence found in their rectums from the same cell-block search. Seven of the fifteen inmates searched had contraband in their rectums, including gun powder and blasting caps. See State v. Bloomer, 751 P.2d 592, 594 (Ariz.

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[1]See Vaughan v. Ricketts, 950 F.2d 1464 (9th Cir. 1991); Vaughan v. Grijalva, 927 F.2d 476 (9th Cir. 1991); Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988).

Ct. App. 1987); State v. Palmer, 751 P.2d 975, 976 (Ariz. Ct. App. 1987). Lawyers for the other inmates told Lowry's attorney that the motions to suppress filed in the other cases had all lost. Lowry's lawyer decided that a suppression motion would have no reasonable probability of success, so he did not prepare and file one.

II. Analysis

We have jurisdiction pursuant to 28 U.S.C. § 2254. The magistrate's findings of fact, adopted by the district court, have not been put at issue. We review the legal issues on denial of habeas corpus petitions de novo. Adams v. Peterson, 968 F.2d 835, 843 (9th Cir. 1992) (en banc).

[1] To demonstrate ineffective assistance of counsel, Lowry must establish deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 688-93 (1984); United States v. Garcia, 997 F.2d

1273, 1283 (9th Cir. 1993). He did not, so we affirm.

Lowry has not demonstrated that his lawyer's performance fell below the Strickland standard of "reasonable professional judgment," or that the lawyer's decision not to file a motion to suppress was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The lawyer's judgment was vindicated by the results in related cases. All the motions to suppress lost, and all the appeals challenging the denials of the motions to suppress lost. See State v. Palmer, 751 P.2d 975, 976 (Ariz. Ct. App. 1987); State v. Bloomer, 751 P.2d 592, 594 (Ariz. Ct. App. 1987).

Lowry's new lawyer on the habeas petition argues that the motions would have been well taken, and the evidence should have been suppressed, under the first of our

decisions in Lowry's civil action, Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988). In that case, we held that if the prisoners' contentions were assumed to be true for purposes of summary judgment, a constitutional violation would have occurred. Id. at 741-42. But Lowry's lawyer cannot be required to anticipate our decision in this later case, because his conduct must be evaluated for purposes of the performance standard of Strickland "as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Also, the lawyer was handling a case with real facts, not deciding a summary judgment motion on assumed facts. He was deciding whether to file a motion to suppress, not whether a summary judgment should have been granted. He could not make his decision based on an artificial assumption of facts which he

could not expect the evidence at a suppression hearing to prove.

Lowry's habeas petition can be well taken, for its deficient performance argument, only if based on the proposition that "a defendant has 'everything to gain and nothing to lose' in filing a motion to suppress." See United States v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991). That proposition suggests that a lawyer should file a suppression motion in every case, because the defendant has nothing to lose and the lawyer can never be certain that the judge will not suppress the evidence against his client. We have rejected that argument where the motion would be without merit. Id. We do so again now. A lawyer's zeal on behalf of his client does not require him to file a motion which he knows to be meritless on the facts and the law. Also, the premise that the defendant has nothing to lose by

such a motion is false. The defendant stands to lose two things of value -- a significant quantity of his lawyer's scarce time, and some of his lawyer's credibility with the judge. Lawyers are not called "counsel" for nothing. The judge is counseled by the lawyers as to how he should proceed. The attentiveness with which the judge listens to the lawyers' advice is tempered by his judgment about the credibility of the particular lawyer. An unmeritorious motion to suppress may cost the particular defendant some deference by the judge to his lawyer's advice on other issues later in the case. It will certainly cost the particular defendant the time his lawyer wastes in the library and at his desk generating valueless paper, when he could be working on better motions, interviewing witnesses, examining locations and evidence,

researching likely evidentiary issues, and preparing for trial.

[2] This is not to say that a motion to suppress may be lightly dispensed with. Few things can more greatly benefit a criminal defendant than keeping the most probative evidence against him from being seen by the jury. But in this case, the experienced defense lawyer knew from his research, and from the denial of suppression motions in other prisoners' criminal cases arising out of the rectum searches of other prisoners in this same disturbance, that the motion would lose. Lowry's lawyer did not render services that fell below the standard of reasonable professional judgment.

The other element of ineffective assistance of counsel is prejudice. Lowry must establish that had the motion been filed, there was a reasonable probability that the evidence would have been

suppressed, and the outcome of the trial would have been different had the evidence been suppressed. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). He concedes, as he must, that there was probable cause and special exigency justifying a warrantless search of his rectum. The magistrate found that the search was constitutionally permissible, and a motion to suppress would have been denied.

Lowry claims that the evidence would have been suppressed because the search was performed in an unconstitutional manner. See Bell v. Wolfish, 441 U.S. 520, 559 (1979); Vaughan v. Ricketts, 859 F.2d 736, 739-41 (9th Cir. 1988).[2] But he cannot

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[2]The inevitable discovery exception to the exclusionary rule has not been briefed, so we do not reach it. Lowry argues that the prison guards should not have subjected him to the discomfort and indignity of the digital rectal searches, because they were going to x-ray him anyway, and could find out from the x-ray all they could learn from

establish a "reasonable probability" that a motion to suppress would have been successful had his lawyer filed one. Kimmelman, 477 U.S. at 375. There is no "reasonable probability" that Lowry would have been acquitted had his lawyer moved to suppress, because as the magistrate found, the search was apparently constitutionally permissible, the other prisoners lost their substantially similar suppression motions, and the denials were upheld on appeal. See State v. Bloomer, 751 P.2d 592, 594 (Ariz. Ct. App. 1987); State v. Palmer, 751 P.2d 975, 976 (Ariz. Ct. App. 1987).

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the digital rectal search and more. But that means they would have found the contraband in his rectum even without the digital search which he claims was unconstitutional. If his argument is right, then his conclusion is wrong -- evidence which would inevitably have been discovered by lawful means cannot be suppressed because the manner of discovery was unconstitutional. Nix v. Williams, 467 U.S. 431, 444 (1984); United States v. Ramirez, 872 F.2d 1392, 1399 (9th Cir. 1989).

[3] The prisoners also lost their section 1983 suit. Vaughan v. Ricketts, 950 F.2d 1464 (9th Cir. 1991). The ground on which Lowry and the other prisoners lost their civil suit, qualified immunity, does not compel the conclusion that they would have lost suppression motions in their criminal cases. But they did. Even though Vaughan left open the logical possibility that the search could be unreasonable even though the prison guards were immune from civil liability for it, nevertheless Lowry failed to demonstrate a "reasonable probability" that, had his lawyer moved to suppress, the evidence would have been suppressed. He had the burden of proving prejudice. Strickland, 466 U.S. at 693.

AFFIRMED.

Opposition Brief Unavailable for filming at this time